(2)

No. 87-1115

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EVAN EBAUGH,
Petitioner,

v.

CESSNA AIRCRAFT COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

R. TERRENCE NEY *
THOMAS L. APPLER
MCGUIRE, WOODS, BATTLE & BOOTHE
8280 Greensboro Drive
Suite 900
McLean, Virginia 22102
(703) 356-2200
Counsel for Respondent Cessna Aircraft Company

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether in a state tort claim in federal court on diversity jurisdiction, the effect of a contractual release of one joint tortfeasor upon the rights and liabilities of another joint tortfeasor is governed by state or federal law?

LIST OF PARENTS, SUBSIDIARIES AND AFFILIATES OF RESPONDENT

The following are parent companies, subsidiaries or affiliates of The Cessna Aircraft Company:

Aircraft Radio Corporation

Cessna DISC Corporation

Cessna Finance Corporation

Cessna Fluid Power, Ltd.

Cessna Foundation, Inc.

Foreign Sales Corporation

General Dynamics Corporation

Reims Aviation

The Pawnee Industrial District

United Hydraulics Corporation

The Wallace Industrial District

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1115

EVAN EBAUGH,

Petitioner,

v.

CESSNA AIRCRAFT COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Cessna Aircraft Company ("Cessna"), respectfully requests that this Court deny the petition for Writ of Certiorari, seeking review of the Fourth Circuit's opinion in this case. That opinion is reported at 830 F.2d 535 (4th Cir. 1987) and is reprinted in Appendix A of the petition for a Writ for Certiorari.

STATUTES INVOLVED

The federal statute involved in this case is Section 34 of the Judiciary Act of 1789, 1 Stat. 92, as amended, 62 Stat. 944, which is presently codified at 28 U.S.C. § 1652. The statute reads as follows:

28 U.S.C. § 1652 State laws as rules of decision.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

The relevant section of the Virginia Code in effect at the time of the accident is as follows:

A. When a covenant not to sue is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

1. It shall not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but it shall reduce the claim against the others to the extent of any amount stipulated by the covenant, or in the amount of the consideration paid for it, whichever is the greater, and

2. It shall discharge the tortfeasors to whom it is given from all liability for contribution to any other tortfeasor.

VA. CODE § 8.01-35.1(A) (Cum. Supp. 1979).

STATEMENT OF THE CASE

On July 25, 1979, the Petitioner ("Ebaugh") and two others sustained personal injuries when the airplane in which they were passengers crashed. Thereafter, Eaugh and his fellow passengers sued several defendants[1] in the United States District Court for the Western District of Virginia.

---

[1] The defendants in the original action were Augusta Aviation Corporation, Teledyne Continental Motors, Anne Adams and Cessna.

During the pendency of that lawsuit, the three plaintiffs, including Ebaugh, agreed to settle their claims with two of the defendants.[2] Teledyne settled the claims against it in return for its dismissal from the lawsuit. All parties, including Ebaugh, endorsed that dismissal. Subsequently, Augusta Aviation settled in return for a covenant not to sue.

Thereafter, Ebaugh filed suit solely against Cessna in state court.[3] Cessna removed the case to the United States District Court on the basis of diversity of citizenship.[4] Once in federal court, Cessna moved for summary judgment on the ground that, under Virginia law, Ebaugh's prior settlement and release of Teledyne operated as a release of Cessna. The District Court granted Cessna's motion, holding that the settlement in the prior lawsuit effected an accord and satisfaction with Teledyne and constituted a release. Because under Virginia law in effect at the time Ebaugh's cause of action arose, the release of one tortfeasor was a release of all, the Court found that Ebaugh had no recourse against Cessna on his claim.

The Fourth Circuit, sitting en banc affirmed, holding that the rights of the parties to the action were governed by Virginia law, not federal law, because the effect of settlements with joint tortfeasors directly involves the substantive rights of the parties with regard to contribution and release.

---

[2] Augusta Aviation Corp. and Teledyne.

[3] The Circuit Court for the City of Richmond, Virginia.

[4] Although the case was originally removed to the United States District Court for the Eastern District of Virginia, it was transferred to the Western District of Virginia (Harrisonburg Division).

REASONS FOR DENYING THE WRIT

In seeking a writ of certiorari, Petitioner Ebaugh claims that the decision of the U.S. Court of Appeals for the Fourth Circuit in *Ebaugh v. Cessna*, 830 F.2d 535 (4th Cir. 1987), is in conflict with prior decisions of this Court. Respondent Cessna respectfully submits that the decision of the Fourth Circuit is in harmony with the decisions of this Court that require a federal court sitting in diversity to apply substantive state law to determine the validity of a contractual release on a joint tortfeasor. Moreover, the guidelines enunciated by this Court in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525 (1958), and *Hanna v. Plumer*, 380 U.S. 460 (1965), yield a conclusion identical to that reached by the Fourth Circuit in this matter. Because there has been no departure from the accepted and usual course of judicial proceedings, and because there are no countervailing federal interests which warrant displacing substantive state law, Petitioner presents no issue which justifies the exercise of this Court's power of supervision.[5] Therefore, Petitioner's request for a Writ of Certiorari should be denied.

I. The Fourth Circuit Correctly Applied Governing Precedents Of This Court.

As the Fourth Circuit stated, a federal court called upon to adjudicate a state law claim under diversity jurisdiction must apply state law to determine the substantive rights and duties of the parties, while applying

---

[5] The federal district court was not the Petitioner's choice of forum. Petitioner filed suit against Respondent in state court. Upon Respondent's motion, this case was removed to federal court on grounds of diversity of citizenship. Had Respondent not sought removal, this case would have been decided in state court on the basis of Virginia law. The Petitioner's insistence that this case presents matters of compelling federal interest rings hollow when viewed in light of his original filing in state court.

federal law to matters of procedure. *Ebaugh*, 830 F.2d at 537. Petitioner suggests that the Court of Appeals, in applying Virginia substantive law to determine the effect of a settlement agreement brought under Virginia tort law, ignored the principals of *Byrd v. Blue Ridge Rural Electrical Cooperative*, and *Hanna v. Plumer*. Petioner, however, misinterprets the standards set forth in *Byrd* and *Hanna*.

A.

This Court in *Byrd* reiterated that federal courts in diversity cases must respect state created rights and obligations as defined by state courts. *Byrd*, 356 U.S. at 535. *Byrd* involved a personal injury claim brought by an employee against his employer. The defendant raised the affirmative defense that because it was the plaintiff's statutory employer, the plaintiff's sole remedy was under the South Carolina Workmen's Compensation Act. The question in *Byrd* was whether the factual issues relating to this defense were to be decided by a judge or by a jury. This Court, in holding that the factual issues were to be resolved by a jury in accordance with federal court policy, engaged in a two part inquiry as to whether state or federal law should be applied when the interests of the two are in conflict.

First, a federal court sitting in diversity must determine if the issue is "bound up" with "state created rights and obligations" in such a way that a federal court is required under *Erie* to apply the state rule. *Byrd*, 356 U.S. at 535. If the issue in question is an "integral part of the special relationship created by statute", state law will apply. *Byrd*, 356 U.S. at 536. Even if the issue is not "bound up" with state created rights and obligations, Part II of the *Byrd* test compels adherence to state law in the absence of federal interests which outweigh the need for uniformity of results. *Byrd*, 356 U.S. at 357.

Under Part I of the *Byrd* inquiry, there is no doubt that in the present case the rights of the petitioner to

recover on his tort claim, and the right of the respondent to be released from the claim, are "bound up" with, and an integral part of state created rights. As the Fourth Circuit correctly stated, in Virginia a joint tortfeasor's right to contribution is a substantive right which arises at the time of the claimed injury. *Ebaugh* 830 F.2d at 540; *Potomac Hospital Corp. v. Dillon*, 229 Va. 355, 329 S.E.2d 41, *cert. denied*, 474 U.S. 971 (1985). This substantive right has been held by the Virginia Supreme Court to be comprised of two components, the right of a tortfeasor to seek contribution from a joint wrongdoer and the right of a tortfeasor to be discharged upon the release of a joint tortfeasor. *Bartholomew v. Bartholomew*, 233 Va. 86, 353 S.E.2d 752 (1987). To say as Ebaugh does, that this Virginia rule is not "bound up" with the state tort claim is simply incorrect.

Petitioner contends that the distinction between a "covenant not to sue", under which a plaintiff may preserve rights to proceed against a joint tortfeasor, and a "release", under which the plaintiff's claim against the co-defendant is barred, is "purely a technical matter of pleading". (Petitioner's Brief, p. 8) Releases and covenants not to sue, however, are not pleadings at all. Rather, they are contracts upon which the substantive rights and liabilities of the parties to a case depend. *Janus Films, Inc. v. Miller*, 801 F.2d 578 (2nd Cir. 1986); *Miller v. Fairchild Industries, Inc.*, 797 F.2d 727 (9th Cir. 1986); *N.L.R.B. v. Superior Forwarding, Inc.*, 762 F.2d 695 (8th Cir. 1985); *Village of Kaktovik v. Watt*, 689 F.2d 222 (D.C. Cir. 1982); *Homestake-Sapin Partners v. U.S.*, 375 F.2d 507 (10th Cir. 1967); *Plymouth Mutual Life Insurance v. Illinois Mid-Continent Life Insurance Co.*, 378 F.2d 389 (3rd Cir. 1967). Cessna is aware of no authority to the contrary. Petitioner has not pointed out any. Accordingly, the ability of a plaintiff to settle with one tortfeasor while proceeding against

another is to be determined not by the pleadings, but rather by the substantive law of Virginia.

The Supreme Court of Virginia has further recognized the substantive nature of the rights of contribution and release by holding that the right of contribution by one joint tortfeasor against another is constitutionally protected against retroactive statutory abridgement. Any retroactive application of a statute adversely affecting this substantive right has been held to violate an individual's due process rights and, as such, is invalid. *Shiflet v. Eller*, 228 Va. 115, 319 S.E.2d 750 (1984); *Potomac Hospital*, 229 Va. at 359, 329 S.E.2d at 44. Surely, Petitioner cannot characterize this strong pronouncement by the Virginia Supreme Court as based on a mere "technical matter of pleading". Petitioner cites no authority for this loose interpretation of Virginia law.

The Fourth Circuit correctly recognized that the substantive rights of the parties here are governed by state law. *Ebaugh*, 830 F.2d at 538. Thus, because the issue of the right of contribution and release among joint tortfeasors is sufficiently "bound up" with state created rights and obligations, *Byrd* requires that state law control in the absence of federal preemption.

Even if this Court believed that the rights and obligations of the parties were not "bound up" with Virginia law, Part II of the *Byrd* analysis still compels the application of state law because this case presents none of the affirmative countervailing considerations necessary to justify the application of federal law. *Byrd*, 356 U.S. at 536. In *Byrd*, this Court found that the strong federal policy regarding the allocation of functions between judge and jury in federal court was a countervailing consideration which required the Court to apply federal policy in the face of a conflicting state rule. The only alleged federal interests asserted by the petitioner in this case are an interest in the promotion of expeditious settlement,

and an interest in furthering a federal court's control over its docket. These manufactured considerations cannot outweigh the overwhelming state interests of the need for uniform enforcement of state created rights and obligations, and the prevention of unfair discrimination resulting to the parties by discarding substantive Virginia law. The balancing test of Part II of the *Byrd* analysis weighs heavily in favor of uniformity of results.

Under both inquiries required by *Byrd*, the Fourth Circuit correctly found that the substantive rights of contribution and release are creatures of state law, and therefore must be applied in federal courts when jurisdiction is based solely on diversity.

B.

It is also clear that the Fourth Circuit correctly decided the present case in accordance with the standards set forth in *Hanna v. Plumer*, 380 U.S. 460 (1965). In *Hanna*, this Court found that service of process in a diversity case must be made in the manner set forth by the Federal Rules of Civil Procedure rather than by state procedure. *Hanna*, 380 U.S. at 463-464. In the absence of a Federal rule directly on point, however, federal courts should be guided by the twin policies which are the basis for the decision in *Erie*. *Hanna*, 380 U.S. at 468. These policies are the discouragement of forum shopping and the avoidance of inequitable administration of the laws. As there is no federal rule on point here, "the twin aims of the *Erie* rule" make plain that state as opposed to federal law applies. *Id.*

First, the Fourth Circuit's decision correctly supports the *Erie* policy of discouraging forum shopping. Petitioner's contention that a contractual release must be interpreted according to federal law merely because the underlying litigation was in a federal court has no logical stopping point. Presumably all contracts that have any nexus to federal court litigation would be governed by

federal rules of construction. The potential for forum shopping is as great as one's ability to envision the multitudes of nuances in state or federal law. Although statutory amendments to VA. CODE § 8.01-35.1 put the Virginia law of release and contribution of joint tortfeasors in line with that of the federal policy, the possibility of forum shopping for other types of contract related litigation is immense. And, for those states still following the common law rule regarding release of tortfeasors, forum shopping is a present and immediate concern. A joint tortfeasor cannot be deprived of his substantive rights of release and contribution merely because one of the parties to the suit is a citizen of another state. It is the policy of *Erie* to achieve a basic uniformity of result between state and federal courts when the presence of diversity offers a litigant a choice of forum. If one follows Petitioner's argument to its conclusion, the policy of *Erie* with regard to the discouragement of forum shopping would become meaningless.

Second, the Fourth Circuit's decision also promotes the "equitable administration of the laws". There is nothing equitable about depriving Cessna of its substantive right to be released from this claim merely because it removed the case to a federal court. Application of federal law principles to determine the effect of a release on a state based tort claim would lead to unworkable confusion, gross unpredictability, inconsistent results between state and federal decisions with regard to the same issues, and perhaps even inconsistent results within the federal courts themselves. To apply different rules to federal cases would undoubtedly encourage the increased filing of state based claims in federal court, in opposition to congressional directive and the policy of federal jurisprudence. Furthermore, *Erie* indicates that resolution of tort claims is to be left to the states, included in which is the relationship of joint tortfeasors and the effects of settlement on joint tortfeasors. *Erie*, 304 U.S.

at 78. Certainly the "equitable administration of laws" cannot be said to favor the deprivation of substantive rights and privileges granted to a citizen by a state.

Other circuits are in accord with the Fourth Circuit's holding. These courts have articulated the principle that although federal courts possess the inherent power to enforce agreements entered into in the settlement of litigation, the construction and enforcement of settlement agreements is governed by precepts of the state law which is applicable to contracts generally. *S and T Manufacturing Co., Inc. v. Hillsborough County, Fla.* 815 F.2d 676 (Fed. Cir. 1987); *Wong v. Bailey*, 752 F.2d 619 (11th Cir. 1985); *Air Line Stewards, etc. v. Trans World Airlines*, 713 F.2d 319 (7th Cir. 1983); *Hageman v. Signal L.P. Gas, Inc.*, 486 F.2d 479 (6th Cir. 1973); *Florida Education Association, Inc. v. Atkinson*, 481 F.2d 662 (5th Cir. 1973). Petitioner has cited no cases that hold to the contrary.

The Petitioner cites *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), in support of his claim that this Court has expressly repudiated the common law rule that a settlement with one tort defendant will release all others. Petitioner misreads the holding in *Zenith*. In *Zenith*, Hazeltine Research Inc. sued Zenith Radio Corporation under a federal statute for patent infringement. This Court held that while the common law would no longer apply to *statutory* causes of action created under federal law, "this Court has referred to this [common law] rule in cases where the rights of the litigants were controlled by state or federal common law." *Zenith*, 401 U.S. at 344. Under the proper reading of *Zenith*, this court has refuted the common law rule of release only for federal statutory causes of action.

As shown, *Hanna* dictates that the courts consider the effect of forum shopping and the inequitable administration of the laws in the absence of an applicable Fed-

eral Rule of Civil Procedure. The Fourth Circuit's decision is in accord with the principles of *Hanna* in properly applying state law to determine the effect of the relief to be granted.

II. This Case Should Not Remain Pending Until The Resolution Of The *Stewart Organization* And *Budinich* Cases.

Petitioner suggests that this Court withhold judgment in the present matter until the resolution of *Stewart Organization, Inc. v. Ricoh Corp.*, No. 86-1908, and *Budinich v. Becton Dickinson and Co.*, No. 87-283. This Court granted certiorari in these cases on October 13, 1987 to consider questions with regard to the application of *Erie* and its progeny. The issues in *Stewart Organization* and *Budinich*, however, are far different from the issue presented in this case.

In *Stewart Organization*, the issue is whether state law or federal law governs the enforceability of a forum selection clause in contracts between two parties. Matters of strong federal concern are inherent in forum selection clauses because of the congressional power to prescribe certain "housekeeping rules" for federal courts. Forum selection clauses present procedural questions similar to those of venue, for which there are federal statutes on point,[6] thus bringing *Stewart* within the ambit of the standard set out in *Hanna*. The issues involved in this case are not of inherent federal concern. The rights of contribution and release of a joint tortfeasor are based on state law, and *Erie* directs that federal courts do not have the power to apply their own obligations under contracts entered into and performed within a state. *Erie*, 304 U.S. at 75. There are impor-

[6] The statute involved in *Stewart Organization* is 28 U.S.C. § 1404(a), governing transfers of civil actions within the federal court system.

tant federal interests at stake in *Stewart Organization.* No such interests are present here.

The same can be said of *Budinich v. Becton Dickinson and Co.* There the issue is whether the timeliness of an appeal from a judgment in a diversity case is a procedural matter to be governed by federal law, or rather a substantive matter for which state law is controlling. *Budinich* is distinguishable from this case because the timing of an appeal in a federal court is a matter governed by Rule 4 of the Federal Rules of Appellate Procedure.[7] There is no federal rule concerning the release of joint tortfeasors in federal court on diversity. Secondly, the Courts of Appeal are split in their decisions with regard to the issue in *Budinich*,[8] while there is no discord in the Circuits as to the application of state substantive law to settlement agreements for state tort actions. Finally, none of the strong countervailing federal interests present in *Budinich* is present in this case.

Stewart Organization and *Budinich* are vastly different from this case. Here, in contrast to those cases, application of the principles laid down by this Court lead to only one result, that reached by the Fourth Circuit. Indeed, there is no serious dispute among the many courts which have faced the issue presented here, thus making this issue unworthy of review by this Court.

---

[7] Federal Rule of Appellate Procedure Rule 4 states in part that in a civil case in which an appeal is permitted by law as a matter of right, notice of the appeal must be filed with the clerk of the district court within thirty days of the date of entry of the judgment or order appealed from.

[8] *See, e.g., Rodriguez v. Handy,* 802 F.2d 817 (5th Cir. 1986); *Fort v. Roadway Express, Inc.,* 746 F.2d 744 (11th Cir. 1984).

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari to review the opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

R. TERRENCE NEY
THOMAS L. APPLER
MCGUIRE, WOODS, BATTLE
& BOOTHE
8280 Greensboro Drive
Suite 900
McLean, Virginia 22102
(703) 356-2200

Counsel for Respondent
Cessna Aircraft Company